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CASE NO. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
LINCOLN ISAAC,
Respondent.

E. P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,
v.
KENNETH L. BELL
Respondent.

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
HOWARD HUGHES,
Respondent.

ON PETITION FOR WRIT OR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMICUS CURIAE BY OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. CAN A STATE REQUIRE A DEFENDANT TO OBJECT TO JURY INSTRUCTIONS AT A POINT WHEN THE TRIAL COURT CAN CONSIDER THE ISSUE IN GIVING ITS INSTRUCTIONS?

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STATUTORY SECTIONS:
Ohio Revised Code, Section 2901.05

STATEMENT OF THE CASE

Isaac

Isaac was found guilty in a jury trial in Pickaway County, Ohio of aggravated assault, a lesser included offense of felonious assault for which he had been indicted. On September 15, 1975, Isaac was sentenced to a term of imprisonment of from 6 months to 5 years. During his trial, Isaac relied upon an affirmative defense of self defense. No objection was entered to an instruction that Isaac bore the burden of proof on self defense by a preponderance of the evidence.

Subsequent to conviction, Isaac appealed to the Court of Appeals of Pickaway County, Ohio. Therein, Isaac relied on the newly decided case of *State v. Robinson,* 47 Ohio St. 2d 103 (1976). In *Robinson,* the Ohio Supreme Court concluded as a matter solely of state statutory law that O.R.C. Section 2901.05(A)(eff. 1-1-74) changed the traditional common law preponderance burden of proof on affirmative defenses to require that a defendant only have the burden of coming forward with sufficient evidence to create an issue as to the affirmative defense.[1] The State then bore the burden of proof beyond a reasonable doubt, not only as to the statutory elements of the crime, but also as to the non existence of the affirmative defense. The Court of Appeals affirmed Isaac's conviction on the basis that he had failed to object to the instruction given.

Isaac further appealed to the Ohio Supreme Court which denied relief on July 20, 1977. On the same day, the Ohio Supreme Court decided *State v. Humphries,* 51 Ohio St. 2d 95 (1977) holding that although the interpretation of O.R.C. Section 2901.05(A) worked by *Robinson* was fully applicable to all trials conducted after January 1, 1974, the effective date of the statute, a defendant who had not objected to the charge on that basis would be precluded from relief.

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[1]In reaction to the *Robinson* decision, the Ohio legislature amended O.R.C. Section 2901.05, effective November 1, 1978, to return to the common law preponderance standard.

On March 31, 1978, Isaac filed a petition for writ of habeas corpus with the United States District Court For The Southern District of Ohio, Eastern Division. Therein Isaac alleged as his sole proposition the failure of the Ohio Courts to apply the *Robinson* decision to his case. The district court, on June 26, 1978 denied the petition, "because the record clearly establishes that petitioner waived his constitutional claim by failing to present it to the trial court". (A41).

Upon appeal, a panel of The United States Court of Appeals For The Sixth Circuit, on February 8, 1980, voted to reverse. (A24). The majority found error on the basis that the selective denial by the Ohio Supreme Court of the benefits of the *Robinson* decision was itself arbitary and capricious and thus a denial of due process. (A26. As such, the majority did not consider the question of whether the instruction itself was a violation of due process. (A31). The concurrence (A33) found error on the basis that the statutory interpretation of *Robinson* had redefined the burden of proof in constitutional terms. (A34). Rehearing en banc was granted on March 24, 1980. (A36).

The decision on rehearing en banc was entered December 12, 1980 and resulted in a 4 member plurality, 2 one judge concurrences and 3 separate dissents representing the votes of 4 judges. (A1). The plurality found error in that *Robinson* created a functional element of "absence of the affirmative defense" which the State was then required to disprove. (A9). Chief Judge Edwards in concurrence was of the view that due process per se requires negation by the State of self defense (A10) and Judge Jones in a separate concurrence expressed approval of the panel decision. (A12). In dissent, Judge Lively disputed the contention of the plurality that Ohio had created a new "element" of the crime. (A16). Judge Engel joined in this opinion as clarified by a subsequent order of the court (A23). Judges Merritt and Kennedy in separate dissents (A20) and (A21) would have found waiver by the failure to object.

On December 31, 1980, the Court granted a stay of the mandate pending certiorari to this Court. (A37).

Bell

Bell was found guilty in a jury trial in Cuyahoga County, Ohio of murder, a lesser included offense of aggravated murder for which had had been indicted. On April 8, 1975, Bell was sentenced to a term of imprisonment of from 15 years to life. Like Isaac, Bell relied upon the affirmative defense of self defense and failed to object to the traditional jury instruction that he bore the burden of proof as to such defense by a preponderance of the evidence.

Subsequent to conviction, Bell appealed to the Court of Appeals of Cuyahoga County, Ohio and the Ohio Supreme Court raising issues not pertinent herein. Said appeals were respectively denied on April 8, 1975 and September 16, 1976.

Thereafter, Bell filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Western Division. As a sole ground for relief, Bell raised for the first time, a due process challenge to the instruction on self defense.

On December 26, 1978, the district court issued an opinion and order denying the petition on the merits. (A49). On January 23, 1978, the district court issued a second opinion and order denying Bell's motion for reconsideration. (A56).

Upon appeal, The United States Court of Appeals For The Sixth Circuit on December 12, 1980, reversed on the authority of the en banc decision in *Isaac*. (A42). On December 31, 1980, the appellate Court granted a stay of the mandate pending certiorari review. (A48).

Hughes

Hughes was found guilty in a jury trial in Summit County, Ohio of the crime of voluntary manslaughter, a lesser included offense of aggravated murder for which he had been indicted. On January 27, 1975, Hughes was sentenced to a term of imprisonment of from 6-25 years. Like Isaac and Bell, Hughes relied on self defense at trial

and raised no objection to an instruction that he bore the burden of proof of the affirmative defense of self defense by a preponderance of the evidence. In fact, Hughes' counsel specifically requested the charge that was given.

Subsequent to conviction, Hughes appealed to the Court of Appeals of Summit County, Ohio and the Ohio Supreme Court. Said appeals were respectively denied on September 24, 1975 and March 16, 1976, both in advance of the decision in *Robinson*. No contention was made in either appeal that the instructions on self defense violated due process.

On April 26, 1977, Hughes filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Eastern Division. Therein, Hughes challenged the constitutionality of the instruction on self defense.

On June 26, 1979, the district court, after interim orders requesting briefing on exhaustion of state remedies and the merits, issued its opinion denying the petition. (A62). The district court found alternatively that Hughes' burden shifting claim was waived by failure of objection and that the instruction itself did not violate federal due process.

On December 18, 1980, The United States Court of Appeals For the Sixth Circuit reversed on the basis of the *Isaac* decision. (A60). A motion to stay the mandate pending certiorari was granted on January 21, 1980. (A61).

ARGUMENT

CAN A STATE REQUIRE A DEFENDANT TO OBJECT TO JURY INSTRUCTIONS AT A POINT WHEN THE TRIAL COURT CAN CONSIDER THE ISSUE IN GIVING ITS INSTRUCTIONS.

What is at issue in this appeal is whether the defendant must call a trial court's attention to an issue of jury instructions at trial or merely wait and take his chance, and whether he can request a jury instruction and later in a Federal Habeas Corpus repudiate his position for one that appears advantageous. In each of the cases here appealed, the defendant did not object to the trial courts instructions on the burden of proof of an affirmative defense and in *State v Hughes*, counsel requested the complained of charge be given.

Ohio law is clear on the point of objecting to jury instructions at a time when something can be done: a defendant cannot wait and raise the issue of incorrect instructions after trial. The Ohio Supreme Court, in summarizing the law in this area, said in *State v Lancaster*, 25 Ohio St. 83, 267 N.E. 2d 291 (1971):

> In the case of *State v Childs* (1968), 14 Ohio St. (2d) 56, 43 0.0. (2d) 119, 236 N.E. (2d) 545, certiorari denied, 394 U.S. 1002, we stated in paragraph three of the syllabus:
>
> "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State v Glaros*, 170 Ohio St. 41, 11 0.0. (2d) 215 (166 N.E. (2d) 379), approved and followed.)" Accord *State v Johnson* (1968), 14 Ohio St. (2d) 67, 43 0.0. (2d) 126, 236 N.E. (2d) 552.
>
> We also re-assert the doctrine we stated at page 62 (of 14 Ohio St., 123 of 0.0. (2d) of the *Childs* case: "Constitutional rights may be lost as finally as any others by a failure to assert them at the proper time. *State v Davis* (1964), 1 Ohio St. (2d) 28, 30 0.0. (2d) 16 (203 N.E. (2d)

357)." The interest of the state in the requirement of timely objection to improper evidence has been recognized in several United States Supreme Court decisions. Compare *Douglas v. Alabama* (1965), 380 U.S. 415; *Henry v. Mississippi* (1965), 379 U.S. 443.

The Respondents tried these cases without raising the issue of the burden of proof but lost, so now they are asserting the improper instruction as an error. In *State v. Tudor,* 154 Ohio St. 249, 95 N.E. 2d 385 (1950):

> A fair administration of justice requires that, when an error occurs in a trial, the trial judge should be given an opportunity, if possible, to correct it. Otherwise, a party could take a chance on success without raising any objection to such error, and then, if he failed to succeed, avail himself of an error which might otherwise have been corrected. See 3 American Jurisprudence, 25 *et seq.*, Section 246.
>
> Any other rule would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial judge to give faultless instructions upon every possible feature of the case. This would disregard entirely the true relationship between the court and counsel which enjoins upon counsel the duty to exercise dilligence and to aid the court, — not by silence to mislead the court into the commission of error. (Emphasis added).

This United States Supreme Court has recognized the validity of the contemporaneous objection rule. In *Hankerson v. North Carolina,* 432 U.S. 233, 244 (1977) the Supreme Court hinted at it in a footnote:

> Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burdenshifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior

to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. *The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.* See e.g., Fed Rule Crim Proc 30. (Emphasis added).

In *Wainwright v. Sykes*, 433 U.S. 72 (1977) that court said:

> The contemporaneous-objection rule itself is by no means peculiar to Florida, and deserves greater respect than Fay gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right. *A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding.* It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question. While the 1966 amendment to Section 2254 requires deference to be given to such determinations made by state courts, the determinations themselves are less apt to be made in the first instance if there is no contemporaneous objection to the admission of the evidence on federal constitutional grounds.
>
> A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation. Without the evidence claimed to be vulnerable on federal constitutional grounds, the jury may acquit the defendant, and that will be the end of the case; or it may nontheless convict the defendant, and he

will have one less federal constitutional claim to assert in his federal habeas petition. If the state trial judge admits the evidence in question after a full hearing, the federal habeas court pursuant to the 1966 amendment to Section 2254 will gain significant guidance from the state ruling in this regard. Subtler considerations as well militate in favor of honor a state contemporaneous-objection rule. An objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate courts or the ultimate issuance of a federal write of habeas corpus based on the impropriety of the state court's rejection of the federal constitutional claim.

• • • •

The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. *To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify.* Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification. (emphasis added). *Id.* at 88-90.

In *Wainwright v. Sykes*, the federal courts had ordered a hearing regarding the voluntariness of a confession where the matter had not been raised at trial and had been rejected by the state courts. The Supreme Court indicated that the Florida courts were bound by the contemporaneous objection rule indicating two bases for the rule: first that it supports finality, and second, to a lesser degree, it prevents sandbagging.

This is the issue confronting this court; and this Court has spoken giving its approval to the use of the contemporaneous objection rule.

Had this issue been raised at trial, as suggested in *Sykes*, the State might have dealt with the entire issue by assuming the burden of disproving the affirmative defense, thus avoiding the current problem. Now, long after the incident in this, and many other cases which will inevitably wind their way trough the courts in years to come, the prosecutor will have to attempt to locate real evidence, which may have been destroyed, and witnesses, who may have moved, died, or forgotten. Trying cases long after the incident is all but impossible for the State. This particularly true, in homicide cases. The issues of insanity, self defense, and intoxication are frequently involved in shootings, knifings and robberies. These factors indicate the need for the contemporaneous objection rule. Cases should be tried once, near the time of the incident, not years later when memories fade.

It is suggested that the contemporaneous objection rule applys to the constitutional claim that the Defendant should not have had the burden of proof but does not apply to statutory claim under then *Ohio Rev. Code Section* 2901.05. The resolution of both of these claims ends in the same result: an instruction by the trial judge on the burden of proof regarding affirmative defenses. If the contemporaneous objection rule applys to one reason for an instruction it applys to other reasons for an identical instruction.

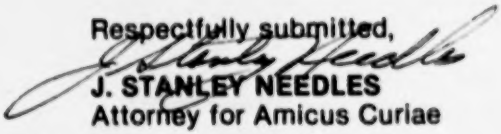
The heroic effort of the Sixth Circuit to find a failure of due process creates chaos with Ohio law, *Wainwright v. Sykes* and the Constitution.

Thus, Ohio's choice of using the contemporaneous objection rule should not be overturned by this court.

CONCLUSION

The Ohio contemporaneous objection rule serves a number of purposes; one of the most important is finality. The Petitioner having failed to raise the issue at trial, cannot raise it later. This court should affirm the District Court in rejecting belated objection to the jury instructions, and reverse the United States Court of Appeals Sixth Circuit.

Respectfully submitted,



J. STANLEY NEEDLES
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5 (b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing brief have been served on James R. Kingsley, 157 W. Main Street, Circleville, Ohio, 43113, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio, 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio, 44325, counsel for Hughes, and upon Simon B. Karas, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, by U.S. Mail, postage paid, this 25 day of March, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio, 43113; Kenneth Bell, #141-727 Marion Correctional Institution, P.O. Box 57, Marion, Ohio, 43302, Howard Hughes, c/o Beasley Surles, 163 Rhodes Avenue, Akron, Ohio 44302.

J. STANLEY NEEDLES
Counsel for Ohio Prosecuting
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AFFIDAVIT

STATE OF OHIO)
) ss.
COUNTY OF HANCOCK)

J. Stanley Needles, Prosecuting Attorney for Hancock County, Ohio, Amicus Curiae for the Ohio Prosecuting Attorneys' Association, being duly sworn, deposes and says that he deposited in the United States Mail, United States Postal Department, forty (40) copies of the Motion and Proposed Brief in the aforecaptioned matter on this 25th day of March, 1981, addressed to the Clerk of the Supreme Court of the United States of America, One (1) First Street NE, Washington D.C. 20543, postage prepaid.

J. STANLEY NEEDLES

J. Stanley Needles, being first duly sworn, deposes and says that the foregoing affidavit is true.

Notary Public

SHIRLEY A. MILLER, Notary Public
STATE OF OHIO
My Commission Expires Jan. 2, ~~1977~~ 1985